No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

IMEE MARCOS-MANOTOC,
Petitioner,

v.

AGAPITA TRAJANO,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1391(f), 1602-1611, is the exclusive jurisdictional basis for suits against officials of foreign governments brought in the courts of the United States?

2. Whether the Alien Tort Statute of 1789, 28 U.S.C. § 1350, which empowers district courts to hear "civil actions by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," applies extraterritorially and encompasses claims by foreign national plaintiffs against foreign government officials arising out of acts occurring entirely within the territory of a foreign sovereign?

3. Whether actions taken by officials of a foreign government within a foreign nation are torts committed "in violation of the law of nations" as that phrase is used in the Alien Tort Statute?

4. Whether in enacting the Alien Tort Statute, the First Congress authorized the courts of the United States to apply the civil codes of foreign nations to award money damages in suits brought under the statute?

5. Whether, so construed, the Alien Tort Statute exceeds the scope of Article III of the Constitution?

STATEMENT PURSUANT TO RULE 14(b)

The caption contains the names of all parties to the case who were parties in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Appendix, pp. 1a-19a) is reported at 978 F.2d 493. The judgment and order of the district court (Appendix, pp. 20a-27a) is unreported.

JURISDICTION AND PARTIES

The judgment of the court of appeals was entered on October 21, 1992. A timely petition for rehearing and suggestion of rehearing *en banc* was denied on December 29, 1992. (Appendix, p. 28a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The parties in the court of appeals and in this Court are petitioner and respondent, in her own behalf and as personal representative of her son. The late Ferdinand E. Marcos was a party in the district court.

28 U.S.C. § 2403(a) may be applicable in that the question of the constitutionality of an Act of Congress, the Alien Tort Statute, 28 U.S.C. § 1350, was decided by the court of appeals and is drawn in question by this petition for a writ of certiorari.

The court of appeals did not certify to the Attorney General that the constitutionality of an Act of Congress had been drawn into question. However, at the request of the court of appeals, the United States had submitted a brief as *amicus curiae* at an earlier stage of this litigation. The court below stated it had considered the submission of the United States in deciding this case. App. p. 2a, n.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, sec. 2, cl. 1 of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; . . . .

2. The Foreign Sovereign Immunities Act provides in relevant part:

> § *1330(a)* The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under §§ 1605-1607 of this title or under any applicable international agreement.
>
> § *1603(a)*: A 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An 'agency or instrumentality of a foreign state' means an entity—
>
> > (1) which is a separate legal person, corporate or otherwise, ...

§ *1604* Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in § 1605-1607 of this chapter.

§ *1605(a)* A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

3. Section 9 of the Judiciary Act of 1789, 1 Stat. 73, 78 provided:

And Be It Further Enacted, that the district court shall have . . . cognizance, concurrent with the courts of the several States, or the circuit courts as the case may be, of all cases where an alien sues for a tort only, committed in violation of the law of nations or a treaty of the United States.

4. 28 U.S.C. § 1350 currently provides:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

STATEMENT OF THE CASE

Petitioner, Imee Marcos-Manotoc, is the daughter of the late Ferdinand E. Marcos, former President of the Republic of the Philippines. She was National Chairman of the Philippine Kabataang Baranggay. App. p. 3a. When President Marcos came to the United States in 1986, Mrs. Manotoc accompanied her father. *Id.*

Shortly after the Marcos family arrived in Hawaii numerous plaintiffs, including respondent, filed suit against President Marcos and Mrs. Manotoc under the Alien Tort Statute.

Respondent's complaint asserted that she was a Filipino who resided with her family in Manila. Respondent alleged that one of her children, Archimedes, resided with her while attending a public university in Manila. According to the complaint, Archimedes was kidnapped and murdered by Philippine military intelligence personnel acting under the authority and control of President Marcos and Mrs. Manotoc. (App. pp. 29a-34a).

The district court (Fong, J.) dismissed all of the complaints, including respondent's, on the ground the defendants were immune from suit under the Act of State doctrine.

On appeal, the Ninth Circuit invited the United States to express its view on the questions of whether subject matter jurisdiction was present, whether a private federal cause of action for damages existed, and the applicability of the Act of State doctrine.[1] In response to the court's request, the United States submitted an *amicus curiae* brief contending that the district court correctly dismissed respondent's complaint for two independent

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[1] The court's order requested the United States to address the following issues: "(1) Do allegations of wrongful death, wrongful arrest, or torture committed by a foreign governmental official against a foreign national in a foreign nation plead a cause of action cognizable in a United States district court under 28 U.S.C. § 1350? (2) May federal courts hear these consolidated cases, despite the 'Act of State' doctrine, either because wrongful death, wrongful arrest, or torture cannot be 'acts of state' as a matter of law, or because the 'balance of relevant considerations' favors a hearing? (3) Should the federal courts abstain from hearing these cases because of potential embarrassment to the United States?" *Trajano v. Marcos*, No. 86-2488, et al., Order filed July 16, 1987.

reasons: the Alien Tort Statute did not give American federal courts subject matter jurisdiction over a suit by an alien against a foreign government official because of acts occurring in a foreign country and, in any event, no federal statute created a private cause of action for money damages in such circumstances. In light of these conclusions, the United States suggested, it was unnecessary for the court to reach the question whether the immunity conferred by the Act of State doctrine barred respondent's action. (*Trajano v. Marcos*, No. 86-2448, et al., Brief for the United States as *Amicus Curiae*, filed October 29, 1987.)

Having requested the advice of the Executive Branch, the court ignored it. Instead, the court entered a terse memorandum reversing the district court's holding that Act of State immunity was applicable and declining to decide any other issue. *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989) (table case).

Following remand, the Judicial Panel on Multidistrict Litigation ordered the complaints against President Marcos and petitioner then pending consolidated in the District of Hawaii. Judge Manuel E. Real of the Central District of California was designated to preside over the consolidated cases.

The litigation against the estate of the late President Marcos is still ongoing. Respondent contended, however, that Mrs. Manotoc was in default and that a separate judgment should be entered against her. On March 25, 1991, the district court entered a default. Following a short hearing, the court summarily entered a judgment for respondent for more than $4,000,000 in actual and punitive damages pursuant to various provisions of the *Philippine* Civil Code. (App. pp. 22a-23a.) No explanation for this ruling was offered.

At respondent's request, the district court severed petitioner's case from the ongoing litigation involving her

late father and entered a final judgment pursuant to Rule 54(b), F.R.Civ.P. (App. pp. 26a-27a.)

On appeal, Mrs. Manotoc contended that respondent's suit for money damages was precluded by the FSIA; that the Alien Tort Statute did not apply extraterritorially and did not encompass a claim by an alien plaintiff against officials of her own government because of actions purportedly occurring within the jurisdiction of a foreign sovereign; that respondent had no private cause of action arising or cognizable under federal law; and that the construction of the Alien Tort Statute proposed by the district court would render the statute unconstitutional. The Ninth Circuit rejected petitioner's submission and affirmed the judgment of the district court.

The court of appeals dismissed petitioner's contention that the Alien Tort Statute did not apply extraterritorially, saying that the statute contains "no limitations as to the citizenship of the defendant, or the locus of the injury" and Congress did not expressly "*prohibit*" extraterritorial application of the statute. (App. pp. 11a-13a.) (emphasis in original). The many decisions of this Court holding that, under such circumstances, a statute is to be construed pursuant to a presumption *against* extraterritorial application went unmentioned.

The court was confident that the phrase "law of nations" in the statute encompassed acts of mistreatment by foreign government officials even when the acts were committed within the territory of a foreign sovereign and involved only citizens of that sovereign. This view was, the court believed, consistent with evolving notions of "customary international law" as they are understood today. (App. pp. 10a-11a.) The relevance of evolving norms of customary international law to a statute enacted two centuries ago was not explained.[2]

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[2] The reasoning of the court below on this point echoes almost word for word the view of Second Circuit regarding "evolving"

The court passed silently over petitioner's submission that the language of the Alien Tort Statute—a tort committed in violation of "the law of nations or a treaty *of the United States*"—refers to a tort committed within the United States and which would be subject to the law of the United States.

After endorsing worldwide jurisdiction under the Alien Tort Statute, the court of appeals tersely affirmed the unexplained holding of the district judge that the Philippine Civil Code should be applied to determine the legal rights of the parties to this case. Under this approach, in the view of the court, a plaintiff's "cause of action comes from [the] municipal tort law" of a foreign sovereign, while the allegation that a violation of international law has occurred "supplies the jurisdictional key to federal court." (App. pp. 18a-19a.) The court did not suggest that the First Congress enacted this novel regime in 1789.

The court perceived no constitutional infirmity to its construction of the Alien Tort Statute. The stated reason was that petitioner had claimed FSIA immunity and "when questions of sovereign immunity under the FSIA are raised" subject matter jurisdiction exists under the authority of *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

Verlinden held that the *FSIA* was a permissible exercise of Congress' power to enact legislation pursuant to the "arising under" clause of Article III. The court below, however, read *Verlinden* as authority for its construction of the Alien Tort Statute because "[o]nly individuals who acted under official authority or under color of such authority" are potential defendants and litigation against such defendants "necessarily implicates sovereign immunity." (App. pp. 15a-16a.) Accordingly,

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principles of extraterritorial law in *Argentine Republic v. Amerada-Hess Shipping Co. Compare*, App. pp. 10a-11a, *with* 830 F.2d 421, 426-26 (2d Cir. 1988), *reversed*, 488 U.S. 428 (1989).

"subject-matter jurisdiction over this action satisfies Article III." *Id.*, at 16a.

The court, having employed the existence of a claim of FSIA immunity to sustain jurisdiction under an entirely different statute, also rejected petitioner's claim of immunity under FSIA. As noted, the court acknowledged that "only individuals who have acted under official authority or under color of such authority may violate international law." Nevertheless, the court held that FSIA did not prevent respondents from obtaining a money judgment against Mrs. Manotoc, *Argentine Republic v. Amerada-Hess Shipping Corporation*, 488 U.S. 428 (1989) notwithstanding. No explanation for this result (beyond the seemingly irrelevant observation that Mrs. Manotoc had defaulted and, therefore, admitted she controlled the Philippine Military Intelligence Agency) was offered. (App. p. 16a.)

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS DECIDED IMPORTANT FEDERAL QUESTIONS IN DISREGARD OF A GOVERNING ACT OF CONGRESS, AND IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT ON THE SAME MATTER.

This case presents important and far-reaching questions regarding the scope of the FSIA and the Alien Tort Statute. The court of appeals held in this case that the courts of the United States are open to tort suits by aliens (but not United States citizens) who seek damages for torts allegedly committed by officials of foreign governments even though the conduct in question occurred entirely within the territory of a foreign sovereign. These holdings are inconsistent with FSIA and controlling decisions of this Court.

A. The Holding Below Directly Conflicts With This Court's Interpretation of FSIA.

This case presents the same question the Court decided in *Argentine Republic v. Amerada-Hess Shipping Cor-*

poration, 488 U.S. 428 (1989): Whether a suit against a foreign government, or an official of a foreign government, may be maintained under the Alien Tort Statute notwithstanding FSIA? In *Amerada-Hess*, this Court emphatically answered that question in the negative. The court below, while acknowledging that "only individuals who have acted under official authority" of a foreign sovereign are potential defendants under its construction of the Alien Tort Statute, nevertheless held that FSIA was not controlling because of Mrs. Manotoc's default. (App. pp. 11a, 16a.) This reflects an astonishing misunderstanding of the structure and purpose of both FSIA and *Amerada-Hess*.

Mrs. Manotoc's default could not give the district court jurisdiction it never possessed. The default had the effect of admitting the factual allegations in respondent's complaint. Those allegations, however, simply confirm that FSIA applies since Mrs. Manotoc was sued because of her purported control over an "agency or instrumentality" of a foreign sovereign—the military intelligence personnel of the Republic of the Philippines. Mrs. Manotoc's default did not and could not alter the Court's holding in *Amerada-Hess* that "[t]he FSIA provides the sole basis for obtaining jurisdiction over a [defendant covered by the Act] in the courts of this country." 488 U.S. at 443. *See Ohio Cent. R. Co. v. Central Trust Co.*, 133 U.S. 83 (1890):

> Although the defendant [in default] may not be allowed, on appeal, to question the want of testimony or the insufficiency or amount of the evidence, he is not precluded from contesting the sufficiency of the [complaint], *or from insisting that the averments contained in it do not justify the decree.*

Id., at 91 (emphasis supplied). In this case, the "averments contained in" respondent's complaint demonstrate that FSIA is the sole basis for jurisdiction by an American court.

The refusal of the court below to accept the controlling force of *Amerada-Hess* may be explained by the court's distaste for the allegations against petitioner. *See*, App. p. 14a. ("One hopes that the universe of potential defendants [against whom such allegations may be made] is not that large"). But the nature of the tort alleged cannot alter the applicability of FSIA. In this connection, it may be noted that the conduct at issue in *Amerada-Hess*—the use of air power to destroy an unarmed merchant vessel on the high seas—is universally denounced by civilized nations. Indeed, it was the record of world-wide condemnation of such action upon which the Second Circuit relied in finding that Argentina's conduct violated the "law of nations." The whole point of *Amerada-Hess* is that American courts lack jurisdiction over all "cases involving alleged violations of international law that do not come within one of the FSIA's exceptions." 488 U.S. at 438. In this case, as in *Amerada-Hess*, there is no such exception. The contrary holding of the court below should be reviewed and corrected.

B. The Holding Below That Federal Legislation Applies Extraterritorially Is in Conflict With Controlling Decisions of This Court.

The court below held that the Alien Tort Statute applies to a tort committed in violation of the "law of nations" anywhere in the world by any foreign government official upon any alien. (But not, ironically, upon United States citizens.) The court reached this extraordinary result because Congress had not gone so far as to "*prohibit* the United States from providing a forum for claims by aliens . . . occurring elsewhere." (App. p. 12a.) (emphasis in original). Thus, since the Alien Tort Statute "on its face" contains "no limitation as to the citizenship of the defendant, or the locus of the injury," (App. p. 13a), it creates *worldwide* subject matter jurisdiction in the district courts. In the instant case, this

all-encompassing jurisdiction was held to embrace an act by a Philippine government official against a Filipino within the territory of the Philippines. *Id.*

This holding—that federal legislation applies extraterritorially unless Congress affirmatively declares that it shall not—is in open and irreconcilable conflict with controlling decisions of this Court. Already this Term the Court has reiterated that

> [i]t is a long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears,' is meant to apply only within the territorial jurisdiction of the United States.

Smith v. United States, No. 91-1538, —— U.S. ——, —— (1993), *quoting*, *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. ——, —— (1991).

In a factual context identical to that presented by this case—an assertion of jurisdiction under the Alien Tort Statute and a claim of immunity under FSIA—the *Amerada-Hess* Court invoked the presumption *against* extraterritorial application of federal legislation and refused to apply either statute extraterritorially. More recently, in *Arabian American Oil*, the Court rebuffed extraterritorial application of an important federal civil rights statute in the absence of a clear statement from Congress that extraterritoriality was intended, even though the litigants were American citizens.

The conflict between the holding below and the controlling decisions of this Court is complete. While this Court has repeatedly held that there is a "presumption against extraterritorial application of United States statutes" (*Smith*, *supra*, —— U.S. ——, *quoting*, *Amerada-Hess*, *supra*, 488 U.S. at 436) which can be overcome only by an "affirmative showing" of a "clear statement" from Congress (*Arabian American Oil*, *supra*, 490 U.S. ——, ——), the holding announced below is the exact reverse: federal legislation applies extraterritorially unless Congress expressly forbids such an

interpretation. The far-reaching consequences of this holding are self-evident. It manifestly warrants this Court's review.

II. THE CONSTRUCTION GIVEN TO THE ALIEN TORT STATUTE BY THE COURT OF APPEALS PRESENTS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE REVIEWED AND DECIDED BY THIS COURT.

The Alien Tort Statute grants the district courts jurisdiction to hear tort actions if the plaintiff is an alien and the tort is one committed "in violation of the law of nations or a treaty of the United States." The phrase "of the United States" is most reasonably read as modifying both the word "treaty" and the phrase "law of nations." Under this construction, the "law of nations" referred to in the statute means a principle of the law of nations which has been adopted as part of American law by Congress. The phrase would also include acts by an American citizen directed against an alien.

The reasons for adopting this construction of the Alien Tort Statute have previously been presented to the Court in the brief submitted by the United States as *amicus curiae* in support of petitioner in *Amerada-Hess*. *See*, *Argentine Republic v. Amerada-Hess Shipping Corporation*, No. 87-1372, October Term, 1987, Brief for the United States pp. 23-27 (filed June 30, 1988). The United States expressed similar views to the court of appeals on the previous appeal in this case. *See*, pp. 4-5 and n.1, *supra*. Petitioner believes the analysis contained in these submissions demonstrate the need for review of the judgment below.

III. THE COURT OF APPEALS IMPROPERLY CREATED A PRIVATE REMEDY FOR MONEY DAMAGES UNAUTHORIZED BY CONGRESS.

The court below recognized that, even under its construction of the Alien Tort Statute, the statute is jurisdictional only; it does not purport to create a private

cause of action. The court of appeals, however, affirmed the holding of the district court that provisions of the Philippine Civil Code were available for an award of actual and punitive damages to respondent.

The court of appeals described the regime which it created as one in which an allegation that there has been a violation of international law provides the "jurisdictional key" (App. p. 19a) to an American federal forum and the "municipal tort law" of a foreign nation then furnishes rights and remedies. *Id.*

This astonishing conclusion was supported by neither reason nor authority.[3] The existence of a cause of action under the laws of a foreign sovereign is simply irrelevant to the question whether Congress has enacted a statute providing aliens with a cause of action, cognizable in American federal courts, for torts committed by foreign government officials within a foreign nation.

Even if Congress could under Article III of the Constitution extend the "arising under" jurisdiction of the federal courts to a case that would be governed solely by the substantive law of a foreign sovereign, the First Congress most certainly did *not* create such an extraordinary system when it enacted the Alien Tort Statute in 1789. The court of appeals did not suggest otherwise.

The holding below can only be described as a usurpation of the legislative function. The extent to which the holding of the court of appeals intrudes upon the constitutional prerogative of Congress is well illustrated by the recent enactment of the Torture Victim Protection Act, Pub. L. 102-256, 106 Stat. 73 (1992) ("TVPA"). The new statute covers the same subject matter as respondent's suit: alleged torture by foreign

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[3] The court below suggested in a footnote that petitioner did not raise this issue on appeal. (App. p. 15a, n.15). In fact, Mrs. Manotoc's brief in the court below argued that the unexplained ruling of the district judge invoking Philippine law "was not only error, but error of constitutional magnitude." Opening Brief of Appellant, pp. 31-32 and n.17.

government officials occurring within foreign nations.[4] Yet, under TVPA, respondent would *not* have a cause of action cognizable in an American federal court. Such a suit would be precluded by Section 2(b) of the new Act. Section 2(b) provides:

> *Exhaustion of remedies.* A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

Compliance with an explicit statutory exhaustion requirement such as this is jurisdictional. Failure to plead (and, if necessary, prove compliance with it) deprives a federal court of the authority to hear the plaintiff's case. *See*, e.g. *Coit Independent Joint Venture v. Federal Savings and Loan Board*, 489 U.S. 561, 579 (1989) (statutory requirement of exhaustion is jurisdictional); *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975) (same).

Moreover, in this case, the exhaustion requirement was the linchpin of enactment of the statute. Thus, Representative Yatron, author of the amendment, emphasized that its effect was to "ensure" that a potential plaintiff seeking to invoke the jurisdiction of a United

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[4] Section 2(a) of TVPA creates a private civil action for money damages against an individual who,

> under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) Subjects an individual to torture or
>
> (2) Subjects an individual to extrajudicial killing.

Section 3 of the Act defines the extrajudicial killing as "a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court . . . [but] does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation." The statute defines "torture" to mean an act "directed against an individual in the offender's custody or physical control, by which severe pain or suffering . . . whether physical or mental, is intentionally inflicted on that individual . . . ."

States court "must have exhausted all legal remedies in the country where the alleged torture took place." 137 Cong.Rec. pp. 11244, 11245 (Nov. 25, 1991). The House Report accompanying the bill which became TVPA dwells on the importance of Section 2(b) in preventing American judicial "intrustion into cases more appropriately handled by courts where the alleged torture or killing occurred" (1992 *U.S. Code Congressional and Administrative News*, p. 87) as well as "encouraging the development of meaningful remedies in other countries." *Id.*, p. 88.

Thus, under TVPA respondent's failure to plead or otherwise suggest she has sought to invoke the jurisdiction of Philippine tribunals would end the matter. Indeed, the fact that the judgment in favor of respondent rests exclusively on provisions of the Philippine Civil Code *of itself* demonstrates that fully "adequate" remedies would be "available" to respondent in her homeland.

The effect of the holding in the court of appeals is to create, under the rubric of the Alien Tort Statute, the same remedy which Congress has now determined to enact in TVPA, *without* the important jurisdictional limitation which Congress stipulated must apply. A clearer example of judicial intrusion into the prerogatives of the Legislative Branch is difficult to imagine.

IV. THE CONSTRUCTION GIVEN THE ALIEN TORT STATUTE BY THE COURT OF APPEALS WOULD RENDER THE STATUTE UNCONSTITUTIONAL.

The statute now codified as 28 U.S.C. § 1350 was originally enacted as one of two jurisdictional grants pertaining to aliens contained in the Judiciary Act of 1789. Section 11 of the Act gave the circuit courts (the principal trial tribunals) jurisdiction of all civil disputes in which $500.00 or more was in controversy and "an alien is a party." Section 9 gave the district courts (tribunals of limited jurisdiction resembling present-day federal magistrate courts) concurrent jurisdiction where

an alien sues for a tort only, in violation of the law of nations or a treaty of the United States.

The First Congress did not explicitly state in either section that the jurisdictional grant was limited to suits in which an alien was suing an American citizen. However, with regard to Section 11, this Court rapidly, repeatedly, and unanimously held that the act could not be read to grant federal jurisdiction where, as here, both parties are aliens. Rather, the jurisdictional grant was necessarily limited to the extent permitted by Article III: Where "an alien is one party, but a citizen is the other." *Mossman v. Higginson*, 4 Dall. 12 (1800). Such a construction was necessary because "[t]he statute cannot extend the jurisdiction beyond the limits of the Constitution." *Hogdson v. Bowerbank*, 5 Cr. 302 (1809). *See also Jackson v. Twentyman*, 2 Pet. 136 (1829):

> "The eleventh section of the Act must be construed in conformity with the Constitution of the United States, and by the latter, the judicial power was not extended to private suits in which an alien is a party unless a citizen be the adverse party."

2 Pet. at 139.

Respondent argued below that these holdings were not controlling because Section 9 of the Act (the current 28 U.S.C. § 1350) should be deemed to have been enacted pursuant to the authority granted by the "arising under" clause of Article III rather than the Alien Diversity Clause. The court below apparently accepted this submission without comment.

The argument is extremely tenuous. There is no historical evidence to support the notion that the First Congress drew the distinction hypothesized by respondent. The improbability that the statute rested upon the "arising under" clause is heightened when it is recalled that the jurisdiction granted by Section 9 was *concurrent* with that of the state courts. By contrast, when Congress

finally granted federal question jurisdiction in 1875, it made that jurisdiction exclusively federal.

However, even if it is assumed that the Alien Tort Statute may be deemed to rest on the "arising under" clause, the constitutional infirmity remains. This Court has repeatedly held that a bare jurisdictional grant cannot, of itself, support "arising under" jurisdiction. *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 496 (1983) ("A statute purporting to confer jurisdiction over actions 'where an alien is a party' would exceed the scope of Article III if construed to allow an action solely between two aliens"); *Mesa v. California*, 489 U.S. 121, 136-37 (1989) ("Pure jurisdictional statute . . . cannot independently support Article III 'arising under' jurisdiction").

The court below reached a contrary result on the theory that, by invoking FSIA immunity, petitioner *created* subject matter jurisdiction under this Court's holding in *Verlinden*. This is a grave misunderstanding of *Verlinden*. *Verlinden* held that *FSIA* was more than a pure jurisdictional statute and, therefore, that it was within the power of Congress to enact. But *Verlinden* did not suggest the bizarre notion that a foreign defendant's suggestion of immunity under FSIA infuses *other* enactments, such as the Alien Tort Statute, with a constitutionality they would otherwise lack.

The holding of the court of appeals turns an assertion of FSIA immunity into a trap. If the claim of immunity is not sustained, federal subject matter jurisdiction exists even though it would otherwise be lacking. Nothing in *Verlinden* suggests such a radical revision of the settled proposition that the lower federal courts have only such subject matter jurisdiction as Congress has given them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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